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# The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process

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# THE IMPRIMATUR OF RECOGNITION: AMERICAN INDIAN TRIBES AND THE FEDERAL ACKNOWLEDGMENT PROCESS

*Abstract:* The Bureau of Indian Affairs administers a program to federally acknowledge unrecognized Indian tribes. The federal acknowledgment process requires that petitioning tribes meet stringent anthropological, historical, and genealogical criteria. These criteria, however, do not accurately reflect prior standards of federal recognition, and the Bureau of Indian Affairs inconsistently interprets them from petition to petition. This Comment describes the background of federal recognition in the executive branch of the government and analyzes the program and its criteria through a comparison of BIA-issued final decisions. This Comment further suggests reform of the federal acknowledgment process through legislative restructuring. In particular, the legislature should amend the criteria to more accurately reflect contemporary tribal society, adequately acknowledge prior federal relations with petitioners, and provide for more stringent accountability by the administering agency.

Federal recognition of Indian tribes is a formal political act that establishes government-to-government relationships between the tribes and the United States. Recognition acknowledges both the sovereign status of the tribes and the responsibilities of the United States toward the tribes.[1] Originally, the federal government used treaties, executive orders and other agreements to recognize tribes.[2] The number of Indian tribes that lack federal recognition, however, is nearly equal in number to those that are recognized.[3] The BIA has determined that the federal government has not formally recognized approximately 230 extant and functioning tribes.[4] Many of these tribes are eligible for, and want, recognition.[5]

In 1978, the Bureau of Indian Affairs (BIA) established an administrative program for federal acknowledgment of unrecognized Indian tribes.[6] This program, called the federal acknowledgment process,[7] originated out of concern for tribes that are legislatively terminated[8]

1. 25 C.F.R. § 83.2 (1989).

2. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268–73 (1986).

3. Currently, the United States recognizes approximately 300 Indian tribes, exclusive of Alaska Native villages. 53 Fed. Reg. 52,829 (1988).

4. *Federal Acknowledgment Process: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988) [hereinafter *Hearing, 1988*] (BIA appendix materials).

5. *See infra* note 56.

6. 25 C.F.R. § 83 (1989) (originally codified at 25 C.F.R. § 54).

7. "Federal acknowledgment process" is an informal designation for the program. *See, e.g., Hearing, 1988, supra* note 4.

8. In the 1950s, Congress terminated, or formally severed federal relations, with many tribes. This policy has since been repudiated, but many tribes have not been restored to federal recognition. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

and otherwise denied rightful recognition.[9] The burdens imposed by the federal acknowledgment process' rigorous research and documentation requirements, bureaucratic delays, and a legal presumption against recognition of petitioning tribes, however, have combined to make the process more burdensome than the problems which the BIA intended to correct. As a result, the acknowledgment program has led the BIA to preclude deserving tribes from federal recognition and impedes the progress of other tribes petitioning under those regulations.

## I. THE HISTORY AND SIGNIFICANCE OF FEDERAL RECOGNITION

### *A. The Evolution of Federal Recognition*

The United States government has recognized Indian tribes in various ways since its own inception.[10] The earliest executive branch recognition of tribes occurred in the context of treaty-making and establishment of executive order reservations.[11] In this century the executive branch, through the Department of the Interior, initially determined which tribes were eligible for its administrative services. Early principles of administrative recognition were based on a United States Supreme Court decision defining a "tribe"[12] and de facto recognition through the words and deeds of the executive and legislative branches.[13]

In his seminal work on Indian law, Felix Cohen, the first solicitor of the BIA, elaborated on the principles of executive recognition by developing the "Cohen criteria."[14] The Cohen criteria present a hierarchy of evidence that the BIA considers when determining tribal status. The most important factors encompass relations with the federal government, including treaty relations, legislation, and denomination

9. TASK FORCE TEN, AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (1976) [hereinafter AIPRC REPORT].

10. 1 F. PRUCHA, THE GREAT FATHER 35 (1984). The Trade and Intercourse Act, ch. 19, 1 Stat. 329 (1793) (modern codification at 25 U.S.C.A. § 177 (West 1983 & Supp. 1990)), forbade individuals and states from treating with North American Indian tribes, and reserved that power exclusively to the federal government. *Id.* at 91.

11. F. PRUCHA, *supra* note 10, at 54–58.

12. Montoya v. United States, 180 U.S. 261 (1901). The Court defined a tribe as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266.

13. *Hearing, 1988, supra* note 4, at 61 (BIA appendix materials).

14. F. COHEN, *supra* note 2, at 270–72. The Cohen criteria were first used to determine the eligibility of tribes to organize pursuant to section 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987 (current version at 25 U.S.C.A. § 476 (West Supp. 1990)).

as a tribe by the government or other tribes.[15] Existence of a tribal council or other body of government that has exercised political authority over a tribe may provide evidence of those relations with the federal government.[16]

Cohen also denominated sociological considerations, such as ethnology, history and social solidarity, as factors entitled to great weight in determining tribal status.[17] Evidence of continuity, including a currently functioning community, is integral to the analysis.[18] Cohen cautioned that the differences between a tribe and a voluntary association can be difficult to determine, particularly where the United States government endeavored to destroy the tribal government.[19]

The Cohen criteria, however, lacked precision in application, and the BIA, until 1978, had no systematic method of applying the criteria to determine which tribes were eligible for its services.[20] In addition to the Cohen criteria, the BIA relied on a mixture of court opinions, limited statutory guidance, treaty law, and evolving departmental policy and practices to determine tribal status.[21] The BIA lacked a clear and consistent system to apply these factors and officially recognize tribes.[22]

Significant court battles of the 1970s also illustrated the need for a systematic acknowledgment process. Northeastern tribes, unrecognized by the federal government but long-standing Indian communities nonetheless, challenged the government's failure to prevent state infringement on tribal autonomy.[23] In Washington state, tribes receiving BIA services lost those services and entitlements following adjudication of the *United States v. Washington* decisions.[24] As a result,

15. F. COHEN, *supra* note 2, at 271–72.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Hearing, 1988, supra* note 4, at 61–62 (BIA appendix materials).

21. *Id.*

22. *Id.*

23. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.) (plaintiff Indians did not exist as a tribal entity at time of suit, and are therefore ineligible for federal protection of tribes under Trade and Intercourse Act), *cert. denied,* 444 U.S. 866 (1979); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (federally unrecognized tribe is entitled to protections of the Trade and Intercourse Act, and the federal government must act to prevent state incursions on tribal lands).

24. The court first found that treaty tribes are entitled to one-half of the harvestable fish taken from Washington state waters. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt I), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The court then found that, because intervener tribes did not maintain an organized tribal structure since treaty signing, they were not eligible to claim tribal treaty fishing rights. United States v.

previously unrecognized tribes, as well as derecognized tribes, began requesting recognition and services from the BIA.[25]

In the 1970s, the problems of landless and unrecognized tribes began to weigh on the legislative conscience. In 1975, Congress established the American Indian Policy Review Commission (AIPRC) to investigate and report on the problems plaguing American Indians.[26] The AIPRC recognized the inconsistency of the BIA's acknowledgment process as a major flaw in administrative policy,[27] and its findings led to introduction of a bill to formalize policy and procedures for a federal recognition program.[28]

Confronted with the AIPRC's report and the increasing number of requests for recognition from unrecognized tribes, the BIA also realized the need for a systematic recognition process. The agency opted to establish its own acknowledgment program by regulation,[29] rather than wait for congressional directive.[30] The federal acknowledgment process established a set of procedures Indian groups must follow when seeking recognition and commensurate benefits from the federal government.[31]

### *B. Why Recognition?*

Federal recognition offers extremely important powers and protections to Indian tribes. Federally recognized Indian tribes exercise limited sovereignty over their own territories, which are held in trust by the United States.[32] Sovereign status confers powers of self-government on tribes and gives rise to federal preemption, which prevents states from infringing on tribal lands and powers.[33] Tribal sovereignty derives, in part, from the treaties negotiated between tribes and the United States in the eighteenth and ninteenth centuries.[34] Many treaties reserved the land bases over which tribes exercise sovereignty, as

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Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981) (Canby, J., dissenting), *cert. denied*, 454 U.S. 1143 (1982).

25. *See Hearing 1988, supra* note 4, at 61 (BIA appendix materials).

26. 2 F. PRUCHA, THE GREAT FATHER 1162–70 (1984).

27. AIPRC REPORT, *supra* note 9, at 3–7.

28. *See Recognition of Certain Indian Tribes: Hearing on S. 2375 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess., at 5–14 (1978) [hereinafter *Hearing, 1978*].

29. 25 C.F.R. § 83 (1989) (originally codified at 25 C.F.R. § 54).

30. Since 1978, Congress has held several oversight hearings and considered proposed legislation on the federal acknowledgment process. *See infra* notes 148–49 and accompanying text.

31. 25 C.F.R. § 83 (1989).

32. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557–62 (1832).

33. McClanahan v. Arizona, 411 U.S. 164 (1973).

34. F. PRUCHA, *supra* note 10, at 17, 31.

well as off-reservation hunting and fishing rights, and rights to services from the federal government.[35]

Federal recognition is also an important requirement for Indian groups seeking services from the federal government.[36] Federal agencies have typically defined their Indian service population according to the Indian Self-Determination Act.[37] That statute defines Indian tribe as "any Indian tribe, band, nation *or other organized group or community,* including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[38]

The BIA adopted this definition into its regulations, but recently deleted the phrase "or other organized group or community" from many of its program regulations and added the requirement of federal recognition.[39] Because of this change in definition, unrecognized tribes are increasingly denied BIA services.[40] Moreover, the BIA's definition further impacts unrecognized tribes because other agencies commonly define eligibility for their services as membership in BIA-recognized tribes.[41] Thus, because federal recognition bestows important benefits, the BIA's administration of the federal acknowledgment process directly affects the livelihood of many Indian tribes.

### *C. The Unseeables: Unrecognized Tribes*

A variety of circumstances, ranging from historic acts and omissions to modern bureaucratic entanglements, have resulted in many contemporary Indian tribes that remain federally unrecognized. Two western states, California and Washington, provide numerous exam-

35. *Id.* at 31; *see also* 4 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2267–2526 (1973).

36. Recently, the United States entered into an $11 million direct funding program with six tribes, bypassing the usual BIA administration of federal grants to tribes. Seattle Times, July 16, 1990, at E-4, col. 1. The United States recognizes all six tribes. *See generally* 53 Fed. Reg. 52,829 (1988). One of the beneficiary tribes, the Jamestown Klallam, was only recently recognized under the federal acknowledgment process. 45 Fed. Reg. 81,890 (1980).

37. 25 U.S.C.A. § 450 (West Supp. 1990).

38. *Id.* § 450b(e) (emphasis added).

39. *See, e.g.,* Financial Assistance and Social Services Program, 25 C.F.R. § 20 (1990); Loans to Indians, 25 C.F.R. § 101 (1990); Housing Improvement Program, 25 C.F.R. § 256 (1990).

40. Some federal services are available to tribes recognized by the state in which they are located. *See, e.g.,* 45 C.F.R. § 96.30 (1989) (defining Department of Health and Human Services block grant eligibility). States, however, may defer to federal recognition. *See, e.g.,* WIS. STAT. ANN. § 20.002(13) (West Supp. 1989).

41. *See, e.g.,* 42 C.F.R. § 36(12) (1989) (limiting Indian Health Service eligibility to members of federally recognized tribes). The BIA annually publishes a list of all federally recognized tribes. *See, e.g.,* 53 Fed. Reg. 52,829 (1988).

ples of tribes in need of a process that can quickly and fairly determine federal recognition.

In California, tribes remain unrecognized because of unratified treaties. The United States negotiated eighteen treaties with California tribes between 1851 and 1852.[42] Based on these agreements, including federal promises to establish 7.5 million acres in reservation land bases, tribes ceded their aboriginal lands and began to relocate.[43] The United States Senate, however, refused to ratify the California treaties[44] and filed them under an injunction of secrecy.[45]

Since 1851, Congress has made various attempts to restore lands and autonomy to the California tribes.[46] In 1958, however, Congress terminated forty-one of the restored tribes.[47] Having repudiated its termination policy, Congress has or will restore twenty-seven terminated tribes to federally recognized status.[48] Nevertheless, an additional twenty-one California tribes that never received the benefit of their treaties are petitioning for recognition under the federal acknowledgment process.[49]

In Washington, nine landless tribes have petitioned for recognition under the acknowledgment program.[50] Prior to the 1974 decision in *United States v. Washington* adjudicating off-reservation fishing rights,[51] the BIA recognized and provided services to these tribes. The tribes enjoyed fishing rights reserved and protected by three treaties between the United States and Western Washington tribes.[52] In 1981, however, the Ninth Circuit denied five of these tribes intervention sta-

42. Heizer, *Treaties,* in 8 HANDBOOK OF NORTH AMERICAN INDIANS 701–02 (W.C. Sturtevant ed. 1978).

43. *Id.*

44. *Id.* at 703. California legislators objected to the quantity of land set aside for reservations. Also, the costs of the annuities and services promised by the treaties greatly exceeded that which the Senate had anticipated and appropriated. F. PRUCHA, *supra* note 10, at 387.

45. Heizer, *supra* note 42, at 703.

46. *See, e.g.,* Four Reservations Act, ch. 48, 13 Stat. 39 (1864) (amended 1865).

47. California Rancheria Act, Pub. L. No. 85–671, 72 Stat. 619 (1958). *See supra* note 8 regarding federal termination policy.

48. *Federal Acknowledgment Administrative Procedures Act of 1989: Hearing on S. 611 Before the Senate Select Comm. on Indian Affairs,* 101st Cong., 1st Sess., pt. 1, at 69 (1989) [hereinafter *Hearing, 1989*] (statement of S.V. Quesenberry, Director of Litigation, California Indian Legal Services).

49. *Hearing, 1988, supra* note 4, at 75 (BIA appendix materials).

50. None of the petitioning tribes have a reservation, primarily due to historical accident and broken treaties. *See, e.g.,* R. RUBY & J. BROWN, A GUIDE TO THE INDIAN TRIBES OF THE PACIFIC NORTHWEST 71, 73, 213, 224 (1986).

51. 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt I), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

52. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.

tus in the litigation over Indian fishing rights.[53] Because this litigation restructured fishing rights in Washington, the landless tribes could no longer legally participate in the Puget Sound fisheries, even on a subsistence basis.[54] In addition, the court's decision prompted the BIA to cease providing services to these tribes.[55] Thus, unrecognized tribes in Washington currently lack both land and access to treaty fisheries.

As these examples illustrate, all three branches of the federal government have participated in ad hoc derecognition of Indian tribes. Many of these tribes are now seeking re-recognition, and the federal acknowledgment process provides the necessary framework for such a program.

### *D. Current Administration of the Federal Acknowledgment Process*

#### *1. Petitions and Decisions*

Since the BIA initiated the acknowledgment process in 1978, 120 Indian groups have petitioned for federal recognition.[56] Final determinations have been made with regard to nineteen of the 120 petitions.[57] The BIA granted eight petitions,[58] denied eleven petitions,[59]

53. United States v. Washington, 641 F.2d 1368 (9th Cir. 1981) (Canby, J., dissenting), *cert. denied,* 454 U.S. 1143 (1982).

54. United States v. Washington, 476 F. Supp. 1101, 1111 (W.D. Wash. 1979), *aff'd,* 641 F.2d 1368 (9th Cir. 1981) (Canby, J., dissenting), *cert. denied,* 454 U.S. 1143 (1982).

55. *Hearing, 1988, supra* note 4, at 12, 88–89 (statement of Russel Barsh on behalf of Cecile Maxwell, Chairperson, Duwamish Tribe).

56. One hundred fourteen Indian groups had petitioned as of May 5, 1989. *Hearing, 1989, supra* note 48, pt. 2, at 47 (statement of Hazel Elbert, Acting Deputy to the Assistant Secretary for Indian Affairs, BIA, Department of the Interior). Six groups have petitioned since. *See* Canoncito Band of Navajos, 55 Fed. Reg. 668 (1990); Revived Ouachita Indians of Arkansas and America, 55 Fed. Reg. 27,903 (1990); Ohlone/Coastanoan Muwekma Tribe, 54 Fed. Reg. 27,070 (1989); Indian Canyon Band of Coastanoan/Mutsun Indians of California, 54 Fed. Reg. 29,948 (1989); Paucatuck Eastern Pequot Indians of Connecticut, 54 Fed. Reg. 30,474 (1989); Salinan Nation, 54 Fed. Reg. 50,027 (1989).

57. Final determinations are unpublished. Copies may be obtained by writing to the Office of Assistant Secretary - Indian Affairs, 1951 Constitution Ave. N.W., Mail Stop 32-SIB, Washington, D.C., 20245.

58. San Juan Southern Paiute Tribe of Arizona, 54 Fed. Reg. 51,502 (1989); Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (1987); Poarch Band of Creeks of Alabama, 49 Fed. Reg. 24,083 (1984); Narrangansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983); Death Valley Timbi-Sha Shoshone Band of California, 47 Fed. Reg. 50,109 (1982); Tunica-Biloxi Indian Tribe of Louisiana, 46 Fed. Reg. 38,411 (1981); Grand Traverse Band of Ottowa and Chippewa, 45 Fed. Reg. 19,821 (1980); Jamestown Clallam, 45 Fed. Reg. 81,890 (1980).

59. Machis Lower Alabama Creek Indian Tribe, Inc., 53 Fed. Reg. 23,694 (1988); Samish Indian Tribe, 52 Fed. Reg. 3709 (1987); Tchinouk Indians of Oregon, 51 Fed. Reg. 2437 (1986); Kaweah Indian Nation, Inc., 50 Fed. Reg. 14,302 (1985); Principal Creek Indian Nation East of the Mississippi, 50 Fed. Reg. 14,302 (1985); United Lumbee Nation of North Carolina and America, Inc., 50 Fed. Reg. 18,746 (1985); Southeastern Cherokee Confederacy, Inc., Northwest

and issued proposed findings against acknowledgment in response to three petitions.[60] Six of these decisions are used as examples for the analysis that follows.[61]

### 2. *How the Federal Acknowledgment Process Works*

The federal acknowledgment procedures require that a group seeking recognition present a petition to the BIA with evidence that the tribe meets each of seven criteria.[62] The burden of proof as to each criterion rests with the petitioner.[63] Failure to prove any one of the criteria results in denial of recognition.[64]

The acknowledgment rules also establish timelines for the BIA to respond to petitions.[65] Once a tribe substantially documents its petition, the BIA reviews it for obvious deficiencies, gives the petitioner notice of deficiencies, and provides additional time to respond.[66] Although the regulations contemplate a single review for obvious deficiencies, in practice the BIA sends repeated deficiency letters and requests for information to the petitioning groups.[67]

Once a petition is complete, the BIA appoints a team of experts to determine the tribe's status.[68] Typically, the team includes an historian, an anthropologist, and a genealogist, each of whom issues a

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Cherokee Wolf Band, Red Clay Inter-Tribal Indian Band, 50 Fed. Reg. 39,047 (1985); Munsee-Thames River Delaware Indian Nation, 47 Fed. Reg. 50,109 (1982); Lower Muscogee Creek Tribe-East of the Mississippi, Inc., 46 Fed. Reg. 51,652 (1981).

60. Miami Nation of Indians of State of Indiana, Inc., 55 Fed. Reg. 29,423 (1990); Mohegan Tribe of Indians of Connecticut, 54 Fed. Reg. 47,136 (1989); Snohomish Tribe of Indians, 48 Fed. Reg. 15,540 (1983).

61. The six decisions include the Jamestown Klallam, Grand Traverse Band of Ottowa and Chippewa, and Poarch Creek favorable determinations, the Samish and Tchinouk negative determinations, and the Snohomish proposed negative determination.

62. 25 C.F.R. § 83.7(a)–.7(g) (1989). The criteria, paraphrased, are as follows: (a) petitioner must establish a continuous Indian identity from historical times to the present; (b) petitioner must inhabit a specific area or distinctly Indian community, and its members must be descendants of an historic tribe; (c) petitioner must have maintained autonomous political authority over its members throughout history; (d) petitioner must present its governing document or a statement describing membership criteria and governance procedures; (e) petitioner must present a membership roll with evidence that all members descended from the historic tribe; (f) petitioner's membership must not belong to other Indian tribes; and (g) petitioner's relationship with the federal government must not have been terminated by Congress.

63. 25 C.F.R. § 83.7 (1989).

64. 25 C.F.R. § 83.9(j) (1989).

65. 25 C.F.R. § 83.9(f)–.9(h) (1989).

66. 25 C.F.R. § 83.9(b) (1989).

67. *Hearing, 1988, supra* note 4, at 203 (statement of Allogan Slagle, Lutheran Office for Governmental Affairs, Evangelical Lutheran Church in America, and Association for Non-Federally Recognized Tribes of California).

68. *Id.* at 63 (BIA appendix materials).

report evaluating the evidence in light of the published criteria.[69] Petitioners provide the bulk of the research, but BIA experts may conduct additional research when evaluating petitions.[70]

Upon completing their analyses, the BIA experts combine or summarize their reports and issue proposed findings with regard to the petition.[71] Following a notice and comment period,[72] the Assistant Secretary of Indian Affairs authorizes and issues the final determination.[73] In theory, the Assistant Secretary could alter the expert team's decision, but has never done so.[74]

## II. ADMINISTRATIVE AND SUBSTANTIVE FLAWS OF THE FEDERAL ACKNOWLEDGMENT PROCESS

### *A. Inside the Process: Analysis of Administrative Decisions*

Many commentators have criticized the federal acknowledgment process, focusing both on its structure and its application.[75] Problems include financial burdens and time delays placed on petitioning tribes, administrative flaws, legal inequities, and fallacies in the expert proof that the process demands. The following sections analyze these problems using the BIA's decisions on six petitions as illustrations.[76]

#### *1. The Burden on Petitioning Tribes*

Tribes petitioning for recognition under the acknowledgment process are faced with the enormous task of documenting their history and current status. Petitioners must submit minutely detailed reports

69. *Id.*

70. 25 C.F.R. § 83.9(a) (1989).

71. *Hearing, 1988, supra* note 4, at 63 (BIA appendix materials).

72. Interested parties may comment on petitions at any time after they are submitted to the BIA. 25 C.F.R. § 83.8(d) (1989). Tribes located near the petitioner often comment. The Tulalip Tribes of Washington submitted comments for both the Snohomish and Samish petitions. Snohomish Tribe of Indians, Inc., BIA Report, Summary at 7 (1983) [hereinafter Snohomish Report] (on file with the *Washington Law Review*); Samish Indian Tribe, BIA Report, at 3 (1987) [hereinafter Samish Report] (on file with the *Washington Law Review*).

73. *Hearing, 1988, supra* note 4, at 62–63 (BIA appendix materials).

74. Quinn, *Public* Ethno*history? Or, Writing Tribal Histories at the BIA,* THE PUB. HISTORIAN, Spring 1988, at 71. A reversal of a decision, which is quite detailed, would presumably require similar detail.

75. *See, e.g.,* Hearing, 1989, *supra* note 48, pts. 1 and 2; *Hearing, 1988, supra* note 4; Barsh, *Dialogue on Federal Acknowledgment of Indian Tribes,* 10-2 PRACTICING ANTHROPOLOGY 2 (1988); Barsh & Hajda, *A Reply to Roth,* 10-3/4 PRACTICING ANTHROPOLOGY 2 (1988); Roessel, *Federal Recognition—A Historical Twist of Fate,* NARF LEGAL REVIEW, Summer 1989, at 1; Association of American Indian Affairs, Inc., *The Federal Acknowledgment Project,* 120 INDIAN AFFAIRS 3 (1989).

76. For a list of decisions, see *supra* note 61.

tracing the history and lineage of their tribe to prove each of the seven BIA criteria.[77] The criteria are written broadly in order to accommodate the variety of social and political profiles that petitioners present.[78] The BIA, however, interprets these criteria narrowly and requires extensive documentation to prove each element.[79]

For example, tribes often encounter problems establishing the first criterion's requirement that petitioners have been identified as American Indians on a "substantially continuous basis."[80] Petitioners must document their existence from their initial contact with non-Indians[81] generation by generation[82] to the present. In early decisions, the BIA accepted lengthy intervals between documentation, inferring that the tribe existed between those intervals.[83] A later BIA decision, however, restricted the acceptable time span between intervals to as little as eight years.[84]

These inconsistencies create uncertainty about the frequency of evidence necessary to prove a substantially continuous Indian identity.[85] Even though the BIA defines the interval as "generational,"[86] the agency may require petitioners to document their history at ten-year intervals or less.[87] Such a requirement is more stringent than that necessitated by the generational definition. The BIA's inconsistent

77. 25 C.F.R. § 83.7(a)–.7(g) (1989).

78. *Hearing, 1988, supra* note 4, at 64 (BIA appendix materials).

79. *See infra* notes 83–84.

80. 25 C.F.R. § 83.7(a) (1989).

81. *Id.* § 83.1(l).

82. *Id.* § 83.1(m).

83. This presumption is based on language in the regulations. 25 C.F.R. § 83.7(a) states: "A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years." The Grand Traverse documentation contained a gap from 1955 to 1971. Grand Traverse Band of Ottawa and Chippewa Indians, BIA Report, anthropological sec. at 12, 20 (1979) [hereinafter Grand Traverse Report] (on file with the *Washington Law Review*). The decision states that this lack of activity was not an "indication that the community was lacking in cohesion." *Id.* at 12. Because there was no evidence that the tribe didn't exist, it existed. Information provided with the Jamestown Klallam petition was sketchy for the periods from 1855 to 1874, 1885 to 1911, and 1940 to 1966. Jamestown Band of Clallam Indians of Washington, BIA Report, anthropological sec. at 7, 10, 14 (1980) (this Comment will henceforth use the tribe's own spelling of its name) [hereinafter Jamestown Klallam Report] (on file with the *Washington Law Review*). The Poarch Creek petition contained a gap from 1850 to 1890. Poarch Band of Creeks of Alabama, BIA Report, anthropological sec. at 3 (1983) [hereinafter Poarch Creek Report] (on file with the *Washington Law Review*).

84. Two gaps in the documentation of Snohomish tribal activity, from 1917 to 1925 and from 1935 to 1950, were sufficient to defeat their eligibility under this criterion. Snohomish Report, *supra* note 72, at 8–10.

85. *Hearing, 1988, supra* note 4, at 40, 198–200 (statement of Allogan Slagle).

86. 25 C.F.R. § 83.1(m) (1989).

87. *See supra* note 84 and accompanying text.

application of the interval criterion has forced later petitioners to struggle with evidentiary ambiguity when documenting their history.

The financial burden to petitioners is also considerable. The cost of preparing petitions is estimated at between $50,000 and $150,000.[88] While some funding is available,[89] petitioners usually must rely on academic volunteers and shoulder the cost of research themselves.

Finally, the time required to process petitions also frustrates petitioning tribes. Research takes years, and the BIA cannot consider a petition until it is fully documented.[90] Once the BIA accepts a petition for consideration, the agency will not issue a final determination for an average of four and one-half years.[91] Moreover, this response time will increase as the petition backlog expands. Such delays result in out-of-date information about petitioners' contemporary community and make funding plans for response to obvious deficiency requests difficult.[92]

### 2. *Legal Inequities*

The BIA derived the acknowledgment criteria from the Cohen criteria,[93] court decisions,[94] and congressional recommendations.[95] The agency, however, chooses selectively from these guidelines, and applies them inconsistently. The result places an inequitable legal burden on petitioning tribes.

88. *Hearing, 1989, supra* note 48, pt. 2, at 198 (appendix materials submitted by the Association for American Indian Affairs, Inc.); *Hearing, 1988, supra* note 4, at 7 (statement of Hazel Elbert); *Id.* at 193 (appendix materials submitted by Native American Rights Fund). For example, the United Houma Nation of Louisiana spent $11,000 responding to a second "obvious deficiency" letter. *Id.* at 271 (statement of Kirby Verret, Chair, United Houma Nation, Inc., Louisiana).

89. For example, the Administration for Native Americans' Status Clarification Project provides some funding for petitioning tribes. Native American Programs Act, 42 U.S.C.A. § 2991 (West Supp. 1990). Regulations found at 45 C.F.R. § 1336 (1989).

90. *Hearing, 1988, supra* note 4, at 62–63 (BIA appendix materials).

91. ORBIS ASSOCIATES, FINAL REPORT: EVALUATION OF STATUS CLARIFICATION PROJECTS FUNDED BY ANA FY 1981 - FY 1988 48 (1989), *reprinted in Hearing, 1989, supra* note 48, pt. 2, at 366.

92. Final determinations typically include a report on the contemporary demographics of the petitioning group because the regulations require evidence of an existing community. 25 C.F.R. § 83.7(a)–.7(e) (1989).

93. *See* F. COHEN, *supra* note 2.

94. *See* cases cited *supra* note 23–24.

95. *Hearings, 1978, supra* note 28, at 61.

*a. Prior Tenets of Recognition*

Four of the acknowledgment criteria require that petitioners provide extremely detailed historical documentation[96] and overcome a presumption against tribal status.[97] In contrast, the Cohen criteria,[98] relevant caselaw,[99] and the legislative recommendations[100] all emphasize the importance of tribal recognition based on treaties, agreements, reservation lands, provision of BIA services, or other actions by the federal government clearly indicating tribal status. The BIA contends that such evidence only establishes proof of tribal existence at specific points in time and requires that petitioners supplement the intervals[101] with "substantive" proof of continuous political and social cohesion.[102] Even the BIA's own relations with a tribe are insufficient to prove de facto recognition.[103] The acknowledgment criteria should recognize the primacy of a petitioner's treaty or other relations with the federal government as evidence of tribal status. Instead, the BIA discounts such evidence, equating it with more mundane documentation.[104] This practice violates prior tenets of recognition that should serve as the foundation of the acknowledgment criteria.

*b. Beyond a Reasonable Burden*

The difficulty of proving the criteria is further compounded by a shifting standard of review. The criteria contain undefined terms and the threshold of proof is obscure. Most alarming, however, is the BIA's inconsistent analysis and application of evidence to the criteria.

Vague descriptive terms cloud meaningful understanding of the standard of review. The BIA has never explicitly defined the meaning of such terms as "substantially continuous Indian identity,"[105] "specific area . . . or community viewed as American Indian and distinct

96. 25 C.F.R. § 83.7(a)–.7(c), .7(e) (1989).

97. *Id.* §§ 83.6(d), 83.7.

98. F. COHEN, *supra* note 2.

99. United States v. John, 437 U.S. 634 (1978) (permitting jurisdiction of a federal criminal statute over tribal member defendant despite lapse of previous federal supervision over tribe); United States v. Sandoval, 231 U.S. 28 (1913) (permitting extension of a federal liquor prohibition to non-reservation Pueblo communities based on the history of relations between those groups and the executive and legislative branches of the federal government).

100. *Hearing, 1978, supra* note 28.

101. The length of this interval is uncertain. *See supra* notes 83–84 and accompanying text.

102. *Hearing, 1988, supra* note 4, at 66–67 (BIA appendix materials).

103. This policy excuses the BIA from responsibility for its unilateral termination of services to tribes such as those in Washington. *See supra* notes 50–55 and accompanying text.

104. 25 C.F.R. § 83.7(a)(1)–.7(a)(7) (1989); *Hearing, 1989, supra* note 48, pt. 2, at 43–44 (statement of Lynn Forcia, Chief, Branch of Acknowledgment and Research, BIA).

105. 25 C.F.R. § 83.7(a) (1989).

from other populations,"[106] or "tribal political influence or other authority."[107] The BIA provides examples of evidence that are acceptable as proof of these terms,[108] but tribes can only interpret those examples based on the agency's final determinations. Unfortunately, the final determinations do not provide consistent examples and are replete with vague terms.[109] Quantified analysis of the evidence is rare.[110]

Treatment of the second criterion[111] in final decisions provides an example of the problem with ambiguous terms. The percentage of a petitioning tribe that must inhabit a specific area or live in a distinct community in order to constitute a "substantial portion" of that tribe is unclear. The BIA is precise in its analysis of the proximity of members to the community in its decisions granting recognition.[112] In its decisions denying recognition, however, the BIA defines the location of petitioners' membership with less precision.[113] Ill-defined terms and inconsistent application frustrate the petitioners' efforts to understand and provide the information necessary to meet the acknowledgment criteria.

An indeterminate quantum of proof compounds the problem of vague terms. The BIA, citing a need for flexibility, refuses to provide material guidance on the cumulative amounts of evidence needed to meet the criteria.[114] As a result, tribes must document their petitions without knowing the necessary requirements. For instance, the intervals at which evidence must be provided to prove a "substantially con-

106. *Id.* § 83.7(b).

107. *Id.* § 83.7(c).

108. BIA, Regulations, Guidelines and Policies for Federal Acknowledgment as an American Indian Tribe (available from the BIA at address *supra* note 57) (on file with the *Washington Law Review*).

109. For example, the term "presumably probably" appears in Grand Traverse Report, *supra* note 83, anthropological sec. at 5.

110. *Hearing, 1988, supra* note 4, at 37 (statement of Faith Roessel, staff attorney, Native American Rights Fund).

111. 25 C.F.R. § 83.7(b) (1989).

112. Among the Grand Traverse, 46% of the tribe lives 150 miles or more from the core community. Grand Traverse Report, *supra* note 83, anthropological sec. at 23. Among the Jamestown Klallam, 41% live more than thirty-five miles away, including 15% that live out of state. Jamestown Klallam Report, *supra* note 83, genealogical sec. at 5.

113. Among the Tchinouk, 51% live elsewhere in Oregon and nine other states. Tchinouk Indians of Oregon, BIA Report, at 43 (1985) [hereinafter Tchinouk Report] (on file with the *Washington Law Review*). The Snohomish decision fails to analyze the location of tribal members. Instead, it states that the tribe is "widely scattered" or "widely dispersed," even though "some members" live in close proximity to each other. Snohomish Report, *supra* note 72, at 12, 14.

114. *Hearing, 1988, supra* note 4, at 64–65 (BIA appendix materials).

tinuous Indian identity" is unclear.[115] Similarly, petitioners are unsure how closely members must live to each other to be a distinct Indian community. While flexibility is essential to permit recognition of a wide variety of tribal profiles, the BIA should provide explicit guidelines and explanations of the quantum of evidence needed to meet the evidentiary burdens.[116]

Ultimately, undefined terms and evidentiary burdens create the major problem with the standard of review—the inconsistency with which it is applied to differing petitions. The BIA claims that each petition is evaluated without reference to any other petition or recognized tribe.[117] This assertion is clearly untrue. For example, the BIA's Snohomish decision is slanted toward comparison of the Snohomish with the Tulalip Tribes of Washington.[118] Likewise, the BIA's Samish decision compares the Samish with the Swinomish and Lummi Tribes of Washington.[119]

Furthermore, inconsistent application of standards are evident throughout the final determinations.[120] The most troubling of these inconsistencies is the BIA's treatment of petitioners' prior claims activity[121] as evidence of continuity and political autonomy.[122] If the BIA conferred recognition on a petitioner, the agency relied on the tribe's prior claims activity as acceptable evidence to meet the various criteria, even when the tribe's specific political authority was unclear.[123] When the BIA has denied petitions, however, the agency

115. 25 C.F.R. § 83.7(a) (1989).

116. The quality of documentary evidence can be an issue as well. The BIA questioned the United Houma Nation's petition on the basis of a newspaper article, despite considerable academic evidence supporting the petition. *Hearing, 1988, supra* note 4, at 277 (statement of Jack Campisi, Associate Professor of Anthropology, Wellesley College). The Snohomish petition cited a humorous anecdotal work, B. MCDONALD, THE EGG AND I (1945), to document the tribe's movement. Snohomish Report, *supra* note 72, at 11.

117. *Hearing, 1989, supra* note 48, pt. 2, at 47 (statement of H. Elbert).

118. Snohomish Report, *supra* note 72, at 8, 10, 15, 16, 17.

119. Samish Report, *supra* note 72, at 5, 9, 19.

120. The decisions contain several inconsistencies in addition to those set forth in the text below. For example, members of all petitioning tribes are of mixed racial heritage, often because of marriages between non-Indian settlers and Indian women. This background is approved in the Poarch Creek decision and disapproved in the Snohomish and Tchinouk decisions. Poarch Creek Report, *supra* note 83, anthropological sec. at 16–18, 20; Snohomish Report, *supra* note 72, at 10; and Tchinouk Report, *supra* note 113, at 47. It is ignored in the Jamestown Klallam decision.

121. Prior claims activity has included, for example, settlement and distribution of proceeds from land cession agreements, reparations for broken treaty promises, and applications for tribal organization under the IRA. *See, e.g.*, R. RUBY & J. BROWN, *supra* note 50, at 180, 213, 224.

122. 25 C.F.R. § 83.7(c) (1989).

123. The Grand Traverse political leadership and processes were based on claims activity, and the final determination admitted little understanding of the historic power and selection of

rejected claims activity as evidence of tribal existence[124] and has even used this evidence against the petitioner.[125]

In sum, the acknowledgment criteria employ vague terms and specify neither the quantity nor the quality of evidence required to prove those terms. Close examination of the BIA decisions reveal the agency's inconsistent treatment of similar evidence in different petitions. The various problems have established a cryptic standard of review that the BIA uses arbitrarily to make determinations concerning tribal recognition.

### 3. *The Fallacy of Expert Proof*

The requirements of the acknowledgment criteria governing petitions encompass three academic areas: anthropology, history, and genealogy. Teams of specialists in these three fields review petitions and write reports that are the foundation of the BIA's final determinations.[126] Other experts, however, have questioned the use of these disciplines to prove or disprove tribal existence.[127]

#### a. *What is a Tribe?*

The term "tribal existence" raises the first question. The goal of the acknowledgment program is to determine tribal existence, but anthropologists note that for many historic Indian groups "tribe" is a misnomer, a European concept complete with inapplicable notions of how tribal society operates.[128] Thus, the BIA forces some petitioning

leaders. Grand Traverse Report, *supra* note 83, anthropological sec. at 5, 9, 21. The historic Poarch Creek leadership and authority was admittedly unclear and described as "informal." The local component of a regional Indian claims organization only commenced governance of the Poarch Creek community in the 1970s. Poarch Creek Report, *supra* note 83, historical sec. at 3, 43–45.

124. The Snohomish decision disregards and rejects that tribe's claims organization and activities as proof of political autonomy. Snohomish Report, *supra* note 72, at 8–10; *see also* Tchinouk Report, *supra* note 113, at 33–37, 39–43.

125. The Samish decision traces the tribe's history through claims activity from the time of contact to the present, and then cited this evidence as proof that *no* political authority operated over the tribe. Samish Report, *supra* note 72, at 19, 21.

126. *Hearing, 1988, supra* note 4, at 68 (BIA appendix materials).

127. *Hearing, 1989, supra* note 48, pt. 2, at 168, 176, 183 (statements of Jack Campisi; Raymond Fogelson, Department of Anthropology, University of Chicago; William Sturtevant, Anthropologist, Smithsonian Institution); *Hearing, 1988, supra* note 4, at 98, 178, 274, (statements of Dr. Wayne Suttles; Jack Campisi; Adolph Dial, Chair, American Indian Studies Department, Pembroke State University); Barsh, *supra* note 75, at 2.

128. *Hearing, 1988, supra* note 4, at 42–52 (statements of Raymond Fogelson, Department of Anthropology, University of Chicago, Joseph G. Jorgensen, Professor of Social Science and Comparative Culture, University of California at Irvine).

groups to prove the "government's false assumptions."[129] Moreover, despite the BIA's assertion that its criteria are flexible,[130] an implied "ideal" tribe emerges from the agency's decisions. This tribe is an isolated community with private landholdings, which provide easily recognizable and consistent documentary evidence of the group's continued existence.[131] The ideal tribe also practices endogamy, or intermarriage within the group, which operates to keep the tribe "pure."[132]

First, all successful petitioners have landholdings, owned privately or held in trust by state or county governments.[133] Although the Grand Traverse, Jamestown Klallam, and Poarch Creek core communities are thoroughly integrated by non-Indians, they are isolated and therefore easily distinguished as distinct Indian communities.[134] The Snohomish and Samish, on the other hand, are not concentrated on a land base, and therefore are not considered geographically distinguishable.[135] Comparable percentages of the tribes live in "specific areas" that should satisfy the criteria. Those areas, however, have become predominantly non-Indian over time.[136] The BIA appears to take the position that an Indian community cannot persist in an urban or quasi-urban environment.

Endogamy is the second implied requirement of a successful petition for recognition. The Grand Traverse and Poarch Creek decisions cite a high degree of intermarriage among each of those groups.[137] The Jamestown Klallam no longer intermarry, but this practice is

129. *Id.* at 101 (statement of Dr. Wayne Suttles). Pacific Northwest tribes, for example, were small interdependent clans lacking centralized authority. *Id.*

130. *Id.* at 64 (BIA appendix materials).

131. *See, e.g.,* Poarch Creek Report, *supra* note 83, historical sec., *passim;* Jamestown Klallam Report, *supra* note 83, historical sec., *passim.*

132. *See, e.g.,* Poarch Creek Report, *supra* note 83, anthropological sec. at 18–20; Grand Traverse Report, *supra* note 83, anthropological sec. at 17–18. None of the successful petitioners have maintained more than a small semblance of traditional social or cultural institutions. Grand Traverse Report, *supra* note 83, anthropological sec. at 19, Jamestown Klallam Report, *supra* note 83, anthropological sec. at 18, Poarch Creek Report, *supra* note 83, anthropological sec. at 20.

133. Grand Traverse Report, *supra* note 83, anthropological sec. at 25–30; Jamestown Klallam Report, *supra* note 83, anthropological sec. at 20; Poarch Creek Report, *supra* note 83, historical sec., map attachment.

134. Grand Traverse Report, *supra* note 83, anthropological sec. at 21; Jamestown Klallam Report, *supra* note 83, anthropological sec. at 17; Poarch Creek Report, *supra* note 83, anthropological sec. at 27.

135. Snohomish Report, *supra* note 72, at 10; Tchinouk Report, *supra* note 113, at 44, 65–66; Samish Report, *supra* note 72, at 9.

136. R. RUBY & J. BROWN, *supra* note 50, at 178, 212.

137. Grand Traverse Report, *supra* note 83, anthropological sec. at 17–18; Poarch Creek Report, *supra* note 83, anthropological sec. at 18–20. *See supra* note 120 and accompanying text.

described as a "relatively late phenomenon."[138] The Pacific Northwest tribes practiced exogamy, the practice of marriage outside the tribe to members of other clans, bands and tribes.[139] The BIA recognizes and accepts this practice in the Jamestown Klallam decision.[140] The Snohomish and Samish decisions, however, cite exogamous practices as evidence of lack of social cohesion.[141] Thus, the BIA's implied requirement of tribal endogamy refutes its assertion that vague criteria permit flexibility in evaluating tribal practices, and instead establishes a standard many petitioners are unable to meet.

*b. The Historical Norm*

The acknowledgment criteria require extensive historical documentation. Such documents, however, do not always accurately or completely reflect the history of Indian tribes. Because North American Indians did not have writing systems, all early documentation proceeds from the writing and perspective of non-Indian observers.[142] Whether and to what extent Indian culture and practices were the subject of historical recordkeeping is often a valid concern.[143] Because the regulations require independent evidence of the community's continuity and political autonomy, the burden of proof can be overwhelming, if not impossible to meet.[144]

*c. The Aboriginal Family Tree*

Use of genealogy to prove tribal ancestry presents its own unique problems. Anthropologists typically use genealogy to learn about kinship and social structures. The BIA, however, uses genealogy in its popular, non-scientific sense, to trace individual ancestry.[145]

The BIA's approach to genealogy creates problems because many North American Indian societies reckoned kinship bilaterally, through both parents, and practiced exogamy and adoption.[146] Because of such practices, genealogic ancestor tracing is difficult and does not

138. Jamestown Klallam Report, *supra* note 83, anthropological sec. at 23.

139. *Hearing, 1988, supra* note 4, at 99–100 (statement of Dr. Wayne Suttles).

140. Jamestown Klallam Report, *supra* note 83, anthropological sec. at 3, 23. The decision does not explain the apparent inconsistency between past endogamy and traditional exogamy.

141. Snohomish Report, *supra* note 72, at 26; Samish Report, *supra* note 72, at 23.

142. *See, e.g.*, W. HODGE, A BIBLIOGRAPHY OF CONTEMPORARY NORTH AMERICAN INDIANS (1976).

143. *Hearing, 1988, supra* note 4, at 227 (statement of Raymond Fogelson).

144. *Id.* at 276 (statement of Jack Campisi).

145. *Id.* at 225 (statement of Raymond Fogelson).

146. *Id.* at 225, 241–48 (statements of Raymond Fogelson and Joseph Jorgensen).

account for non-blood relations.[147] Although some petitioners can trace their ancestry back to settlement rolls prepared in the late 1800s and early 1900s, other tribes do not have the benefit of BIA-approved lists prepared within the last three or four generations.

### *B. Proposals for Reform*

While the current acknowledgment program contains serious flaws, the process it embodies is important and must be reformed for the benefit of petitioning tribes. Since 1978, the United States Senate has held a number of oversight hearings directed at the federal acknowledgment process and its problems.[148] In 1989, two bills were introduced to legislate a new structure for the program.[149] Despite considerable concern about the existing program expressed at these proceedings, Congress has failed to act. While Congress has the authority to provide solutions to the problems of the acknowledgment program, interminable oversight hearings resulting in studies, reports, and proposed legislation are insufficient. Congress needs to imprint the recognition program with a fundamental concern for tribal sovereignty, prior governmental relations, and administrative accountability.[150] Further, currently recognized tribes must acknowledge the importance of the federal recognition program for all Indians and actively participate in its reform.[151]

First, a new program needs to assume objectivity. To this end, a new office, independent of the BIA, is necessary. That office must be adequately staffed and funded to process petitions within a reasonable time and incorporate an appellate procedure for aggrieved petitioners. Petitioners denied acknowledgment under the current regulations should have access to the new appellate process.

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147. *Id.*

148. *Hearing, 1989, supra* note 48, pts. 1 and 2; *Hearing, 1988, supra* note 4; *Oversight of the Federal Acknowledgment Process: Hearing Before the Senate Select Comm. on Indian Affairs,* 98th Cong., 1st Sess. (1983); *Federal Acknowledgment Process: Hearing Before the Senate Select Comm. on Indian Affairs,* 96th Cong., 2d Sess. (1980); *Federal Recognition of Indian Tribes: Hearing on H.R. 12996 and H.R. 13773 Before the House Subcomm. on Indian Affairs and Public Lands,* 95th Cong., 2d Sess. (1978).

149. S. 611, 101st Cong., 1st Sess., 135 CONG. REC. S2846 (1989); S. 912, 101st Cong., 1st Sess., 135 CONG. REC. S4733 (1989).

150. Sen. Daniel Inouye proposed many of these reforms in Senate Bill S. 611. That bill never emerged from committee, criticized in large part for the default deadlines it imposed on the process. *Hearing, 1989, supra* note 48, pts. 1 and 2.

151. Russel Barsh predicts a new era in federal Indian policy, termed "redetermination," in which the BIA will use the federal acknowledgment criteria to limit services to existing tribes. Barsh, *The Rocky Road to "Recognition,"* 4 ANN. W. REGIONAL INDIAN L. SYMP. 407 (1990).

Second, Congress should legislate the criteria for recognition, leaving explanatory guidelines for administrative creation. The criteria should establish a prima facie case of acknowledgment where petitioner can demonstrate ancestry from a tribe with a history of treaty or other substantial relations with the federal government. Where no such relations are evident, the petitioners would bear the burden of proving their tribal background. New regulations should ease the documentary burden on petitioners, however, by defining the terms of recognition and relaxing the intervals of documentation. At the same time, the criteria should explicitly acknowledge that Indian communities display many social and political profiles and that petitions must be decided in the context of similar contemporary Indian communities.

Third, the new acknowledgment office should issue detailed guidelines precisely defining the thresholds of proof and addressing the quantity and quality of evidence necessary to meet those thresholds. The agency should adhere to its own precedent.

Finally, Congress should provide funding to tribes unable to shoulder the costs of petitioning for acknowledgment and should direct the BIA to provide research support to petitioning tribes by assisting with access to the department's archives.

The costs of these proposals are not small. The costs of the current program, however, economically and psychologically, are much greater. An independent office provided with competent legislative direction can more efficiently and fairly determine recognition for the many tribes now awaiting that status.

## III. CONCLUSION

Final determinations emerge out of an accumulation of small distinctions. It is the nature of the analysis—small inconsistencies with large cumulative impact—that has insulated the BIA from critical review of its decisionmaking processes.

The problems of the federal acknowledgment process range from the administrative to the substantive. Procedural delays create an unfair process. The criteria fail to reflect prior standards of recognition that should anchor the decisionmaking criteria. The BIA is using evidence inconsistently and employing vague, unquantified standards to arrive at unreviewable conclusions. The agency models comparison on a rigid definition of tribal society that cannot reflect the social reality of the many diverse North American tribes.

Although the goals of the acknowledgment program are laudable, its practical application has evolved into an arbitrary process that frustrates the efforts of legitimate tribes seeking federal recognition. Legislative reform is necessary to correct the problems of the federal acknowledgment process. Congress must actively redirect the program to meet its original goals of justice and opportunity for deserving tribes.

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